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No. 96-1738

In the Supreme Court of the United States

OCTOBER TERM, 1996

RAYMOND RYBAR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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11 pp

QUESTION PRESENTED

Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, authorized Congress to enact 18 U.S.C. 922(*o*), which makes it a federal crime to transfer or possess a machinegun.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 103 F.3d 273.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1996. A petition for rehearing was denied on January 31, 1997. Pet. App. 42a-43a. An amended order denying the petition for rehearing was issued on February 5, 1997. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on April 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following entry of a conditional guilty plea in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of possessing a machinegun, in violation of 18 U.S.C. 922(*o*). He was sentenced to 18 months' imprisonment and three years' supervised release. The court of appeals affirmed. Pet. App. 1a-41a.

1. On April 4 and April 5, 1992, petitioner sold two machineguns to a private citizen. He was indicted on two counts of possessing a machinegun, in violation of 18 U.S.C. 922(*o*), and two counts of unlawfully transferring an unregistered firearm, in violation of 26 U.S.C. 5861(e). Pet. App. 2a-3a. Section 922(*o*) generally provides that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. 922(*o*)(1).[1]

Petitioner moved to dismiss the indictment. He argued, *inter alia*, that Section 922(*o*) exceeds Congress's authority under the Commerce Clause and is therefore invalid. The district court denied the motion with respect to the possession counts under Section 922(*o*). Pet. App. 3a.[2] Petitioner then entered a conditional guilty plea (see Fed. R. Crim. P. 11(a)(2)) to the possession counts, preserving the constitutional issue for appeal. Pet. App. 4a.

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[1] The statutory prohibition does not apply, however, to the transfer or possession of machineguns by federal, state, or local governmental agencies, 18 U.S.C. 922(*o*)(2)(A), or to the "lawful transfer or lawful possession of a machinegun that was lawfully possessed before" the statute's effective date, 18 U.S.C. 922(*o*)(2)(B).

[2] The court dismissed the transfer counts on a separate legal ground. See Pet. App. 3a.

2. The court of appeals affirmed. Pet. App. 1a-41a. In his challenge to the constitutionality of Section 922(*o*), petitioner placed primary reliance on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), which made it a federal crime to possess a firearm within 1,000 feet of a school. See Pet. App. 6a.

The court of appeals concluded that *Lopez* was not controlling. The court observed that "unlike the situation in *Lopez*, there are legislative findings to aid judicial evaluation of the effect of machine guns on interstate commerce." Pet. App. 11a. Although neither the text nor the history of Section 922(*o*) itself included findings as to the nexus between machinegun possession and interstate commerce, the court of appeals explained, "[c]ongressional findings generated throughout Congress' history of firearms regulation" cast light on that connection. *Ibid.* Before the passage of Section 922(*o*), the court observed, Congress "had already passed three firearm statutes under its commerce power based on its explicit connection of the interstate flow of firearms to the increasing serious violent crime in this country." *Id.* at 15a.

The court of appeals also found it "evident from § 922(*o*) that 'possession and transfer' of a machine gun is an economic activity that Congress could reasonably have believed would be repeated elsewhere and thereby substantially affect interstate commerce." Pet. App. 18a. "[A]t least in most circumstances," the court observed, unlawful possession of a machinegun "follows an unlawful transfer." *Ibid.* Therefore, the court stated, Congress "could well have contemplated that the economic activity regulated, at least in the

aggregate, substantially affects interstate commerce." *Ibid.* Section 922(*o*), the court concluded, "can be sustained because it targets the possession of machine guns as a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce in machine guns." *Id.* at 19a.[3]

Judge Alito dissented. Pet. App. 26a-41a. He concluded that Section 922(*o*) "is the closest extant relative of the statute struck down in *Lopez*," and that *Lopez* "requires [the court] to invalidate the statutory provision at issue here in its present form." Pet. App. 26a. In Judge Alito's view, Congress had not found, and the government had not demonstrated, that possession of machineguns has a substantial effect on interstate commerce. *Id.* at 40a.

ARGUMENT

Petitioner contends (Pet. 4-14) that 18 U.S.C. 922(*o*) exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. Petitioner principally relies on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), which invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q). Since this Court's decision in *Lopez*, however, the courts of appeals have consistently upheld Section 922(*o*) against constitutional attack. See *United States* v. *Knutson*, 113 F.3d 27, 28-31 (5th Cir. 1997); *United States* v. *Kirk*, 105 F.3d 997, 998 (5th Cir. 1997) (en banc) (equally divided court), petition for cert. pending, No. 96-1759; *United States* v. *Beuckelaere*, 91 F.3d 781, 782-787 (6th Cir. 1996); *United States* v.

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[3] The court of appeals also rejected petitioner's contention that Section 922(*o*) is invalid under the Second Amendment. Pet. App. 23a-25a. Petitioner does not press that claim in this Court.

Kenney, 91 F.3d 884, 885-891 (7th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948, 951-952 (9th Cir.), cert. denied, 117 S. Ct. 72 (1996); *United States* v. *Wilks*, 58 F.3d 1518, 1519-1521 (10th Cir. 1995). In the absence of a conflict in the circuits, the court of appeals' conclusion that the statute is constitutional does not warrant this Court's review.[4]

In *Lopez*, this Court concluded that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Section 922(*o*)'s ban on possession of machineguns, by contrast, is part of a larger prohibition on the possession *or transfer* of a particularly dangerous class of weapons. "[A]t least in most situations," the court of appeals recognized, unlawful possession of a machinegun "follows an unlawful transfer." Pet. App. 18a. The possession offense defined by Section 922(*o*)—unlike the conduct prohibited by the Gun-Free School Zones Act—is therefore typically linked to a prior unlawful transaction. Because the statutory ban on possession of machineguns is a rational means of effectuating the prohibition on transfers, see Pet. App. 19a (characterizing the ban on possession as "a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce in machine guns"), it is not akin to the prohibition imposed by Section 922(q).

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[4] Although he concedes that the courts of appeals have uniformly upheld Section 922(*o*), petitioner argues (Pet. 10-14) that there are conflicts in the reasoning of the lower courts' opinions. This Court, however, "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Lab.*, 351 U.S. 292, 297 (1956)).

Petitioner does not contend that Section 922(*o*)'s prohibition on the transfer of machineguns is itself unconstitutional. Cf. Pet. 5 n.1 (stating that the constitutionality of the transfer ban was neither briefed nor argued below). Any such claim would be unsound. Congress could reasonably conclude that transfers of machineguns would typically have a commercial or economic component. See Pet. App. 18a. Congress could also reasonably conclude that the "extensive, intricate, and definitely national market for machineguns," *Beuckelaere*, 91 F.3d at 784, is an appropriate subject for federal regulation. See *Knutson*, 113 F.3d at 29 ("the vast majority of machinegun possessions constitute the culminating step in interstate commercial transactions"); *Rambo*, 74 F.3d at 952 ("By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns."); *Wilks*, 58 F.3d at 1521 (Section 922(*o*) "represents Congressional regulation of an item bound up with interstate attributes"). Although the acts prohibited by the statute might occasionally involve purely intrastate activity, Congress has the authority to regulate intrastate conduct when a series of such events, taken in combination, might ultimately have substantial effects on interstate commerce. See, *e.g.*, *Huddleston* v. *United States*, 415 U.S. 814, 833 (1974); *Perez* v. *United States*, 402 U.S. 146 (1971); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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